IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.640 OF 2005
A/W. CRI.W.P. NOS.641/2005, 642/2005, 643/2005,
644/2005, 647/2005.

Jiten Choksey & Anr. ...Petitioners.

V/s

The State of Maharashtra
and anr. ...Respondents.

Mr. S.D. Mogre for the petitioners.
Mr. V.S. Jain for respondent No.2

CORAM: V.M.KANADE,J.
DATE: 3rd May, 2005

P.C.:

1. Petitioners are challenging the order of issuance of process by the Metropolitan Magistrate, 5th Court, Dadar, Mumbai on a complaint filed under section 138 of the Negotiable Instruments Act.

2. It is submitted by the learned Counsel appearing on behalf of the petitioners that the petitioners had resigned as Directors prior to the issuance of cheque. In support of the said submission, the learned Counsel relied on Form 32 which is annexed at Exhibits-C and D in all the above Writ Petitions in which it is stated that the Petitioner No.1 resigned on 1/11/1988 and Petitioner No.2 resigned on 1/4/1996. It is submitted that the petitioners were not Directors of the Company

when the cheque was dishonoured and an intimation was given on 16/11/2000. It is, therefore, submitted that they were not in charge of or in control of the affairs of the Company at the time of dishonour of the cheque and, therefore, they were not liable to be prosecuted under the provisions of section 138 read with section 141 of the Negotiable Instruments Act. The learned Counsel has also relied upon the interim order passed by this Court in respect of the present petitioners in Criminal Application No.4131 of 2004 and 4132 of 2004 and also in Criminal Writ Petition No. 1761 of 2003. In the said case, the process in respect of petitioner No.1 was quashed. However, the process was not quashed in respect of petitioner No.2. However, the learned Counsel appearing on behalf of the petitioners has admitted that those applications and petition were filed in respect of other complaints which were filed against the petitioners and that too in respect of some other Company and not in respect of the present complainant.

3. The learned Counsel for the petitioners thereafter submitted that the statutory demand notice was not issued to the petitioners. The learned Counsel has relied on the notice at Exhibit-C dated 23/11/2000 (at pages 22 & 23 of the petition) which is addressed to

Kesto Investment & Trading (P) Ltd. and Shri Dhiren K. Jhaveri and its C.C. is addressed to the petitioner Nos. 1 and 2. He, therefore, submitted that since the statutory demand notice was not addressed to the petitioners, the complaint itself was liable to be quashed.

4. The learned Counsel appearing on behalf of respondent No.2 vehemently opposed the said submissions made by the learned Counsel for the petitioners. He has submitted that Form 32 which was produced by the petitioners was fabricated. It is submitted that the resignation of the petitioners is seriously disputed by the complainant. He has brought to my notice handwriting expert's opinion in which it is stated that the signature of Shri Javeri who had applied for Form 32 appears to be forged and fabricated. He submitted that since the resignation of the petitioners is seriously disputed, this question will have to be decided by the trial court after the evidence is adduced by both the parties.

5. The submissions made by the learned Counsel appearing on behalf of respondent No.2 will have to be accepted. It is a settled position in law that though there is a presumption regarding the certified copy of

Form 32 about its genuineness under section 79 of the Evidence Act and section 610 of the Companies Act yet, if it is disputed then, only the trial court can give finding regarding the genuineness of the document. In the present petitions, Petitioners have annexed Form 32. Thus, certified copy of Form 32 has not been produced in this Court. Apart from that, the genuineness of the said document is seriously disputed as the complainant has obtained handwriting expert's opinion in which it is stated that the signature of Director Dhiren K. Jhaveri who had applied and signed Form 32 itself was bogus. The interim order passed by Shri Justice A.M. Khanwilkar in Criminal Application Nos. 4131 of 2004 and 4132 of 2004 is not binding on this Court as a precedent since these Criminal Applications are being disposed of finally at the admission stage. Similarly, the judgment and order passed by Smt. Justice V.K. Tahilramani in Criminal Writ Petition No.1761 of 2003 also will not be of any assistance to the petitioners as, at that time, the handwriting expert's opinion was not available whereas, in this case, the complainant had obtained the handwriting expert's opinion who has expressed his doubt regarding the genuineness of the said document. The said contention of the petitioners, therefore, cannot be accepted.

6. So far as the second submission of the petitioners which is recorded in para 3 of this order is concerned, it cannot be accepted. The learned counsel appearing on behalf of respondent No.2 has brought to my notice the reply given by the present petitioners to the demand notice which is annexed at Exhibit-B to the petitions dated 20/12/2000. In the said reply, petitioners admitted that they have received the notice dated 23/11/2000. In para 2 it is stated that the said notice had been addressed to them in the capacity as purported Directors of Kesto Investment and Trading (P) Ltd. Thus, it is evident that a separate notice was, in fact, addressed to the petitioners which has been admitted by them in their reply. There is thus no substance in the submissions made by the learned Counsel appearing on behalf of the petitioners and all the above Writ Petitions are, therefore, rejected. All questions raised in these petitions are kept open. Petitioner No.2 is granted exemption from appearing in the trial court on each and every day. The Magistrate may not insist on his personal appearance on each and every day and he may be permitted to remain present only when his presence is necessary.

7. With the above directions, all the above Criminal Writ Petitions are disposed of.

V.M. KANADE, J.